Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-4171

LIZZIE ETHEL KIELWEIN, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner prays that a *Writ of Certiorari* issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit entered April 22, 1976, rehearing denied June 23, 1976, which reversed the District Court's Order that the petitioner have judgment against the United States pursuant to the provisions of Title 28, U. S. C., § 1346(b) in the amount of One Hundred Twenty-three Thousand Five Hundred Seventy-eight and 90/100 ($123,578.90) Dollars, on the ground that the District Court was in error in finding as a fact that petitioner had proved an intervening fact affecting the amount of her claim pursuant to the provisions of Title 28, U. S. C., § 2675(b).

OPINIONS BELOW

The District Court's Findings of Fact and Conclusions of Law appear in transcript at 545-546 and 605-610 (App. 17-21). The District Court's Order for Judgment (App. 22) is unreported. The opinion of the Court of Appeals (App. 22-30) is not yet reported. The Order denying rehearing by the Court of Appeals was entered on June 23, 1976 (App. 30).

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1976, (App. 22) and rehearing was denied by the Court of Appeals on June 23, 1976 (App. 30). The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C., § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where agents of a federal agency, inflicting personal injury upon the petitioner, lead the petitioner to believe that the disabilities from which she suffered would be alleviated substantially by remedial surgery to be performed by physicians of that agency and after petitioners filing the administrative claim physicians of that agency advised petitioner that there was no relief for her disability, do such circumstances constitute intervening facts affecting the amount of the claim within the meaning of Title 28, U. S. C., § 2675(b)?

2. May the Court of Appeals disregard the Findings of Fact by the District Court relative to proof of intervening facts affecting the amount of the administrative claim within the meaning of Title 28, U. S. C., § 2675(b) where the testimony of the petitioner on this issue was unchallenged and the Court of Appeals considered matters not in evidence to conclude that the District Court was clearly erroneous without reducing Rule 52(a) of the Federal Rules of Civil Procedure to a nullity?

STATUTORY AND RULES PROVISIONS INVOLVED

United States Code, Title 28:

§ 1346(b)

"Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

United States Code, Title 28:

§ 2675(b)

"Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim."

Federal Rules of Civil Procedure

Rule 52(a)

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory

injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

STATEMENT OF THE CASE

This Federal Tort Claims case was commenced by the filing of an administrative claim with the Department of the Navy in the amount of Twenty-five Thousand ($25,000-.00) Dollars on October 1, 1971. No action was taken by the Navy for over six (6) months and the petitioner filed a Complaint in the United States District Court for the District of South Carolina on August 24, 1972, seeking damages against the United States in excess of the amount in the administrative claim under the provisions of Title 28, U. S. C., § 2675(b). Petitioner, a service dependent, was seeking damages for the injuries she received as a result of the negligence of the Navy surgeon who on October 2, 1970, at the Beaufort Naval Hospital, Beaufort, South Carolina, negligently severed petitioner's left spinal accessory nerve. As a result of the injury, petitioner was sent by the Navy to orthopaedic and neurological specialists seeking relief from the drooping of the left shoulder and painful symptoms of the injury. Petitioner was advised by every specialist that there were operative procedures available which would alleviate her painful condition. Petitioner maintained that she was aware that the nerve had been damaged or severed; however, she did not learn finally that nothing could be done to alleviate her painful condition until she was advised by two specialists at the Bethesda Naval Hospital in February, 1972, several months after she had filed her administrative claim.

The respondent's Answer admitted that petitioner had exhausted her administrative remedies, but later the respondent moved to limit recovery to Twenty-five Thousand ($25,000.00) Dollars, the amount of the administrative claim. At the conclusion of the petitioner's case, the respondent argued its motion to limit damages, at which time the District Court entered its Finding of Fact and overruled the motion on the basis that petitioner had proved an intervening fact, as required by Title 28, U. S. C., § 2675(b) (App. 18). The conclusion of the District Court that petitioner had proved an intervening fact affecting the amount of the claim was based upon the fact that petitioner did not have knowledge that there was no operation or medical procedure available to relieve or alleviate her condition until she was told by the Navy specialist that her condition could not be alleviated. The District Court issued its Findings of Fact and Conclusions of Law wherein it was found as a fact that the Navy surgeon was negligent (App. 19) and ordered judgment for petitioner in the amount of One Hundred Twenty-three Thousand Five Hundred Seventy-eight and 90/100 ($123,578.90) Dollars. (App. 21).

On appeal, respondent did not challenge the District Court's finding of negligence but maintained that the District Court exceeded its jurisdiction under Title 28, U. S. C., § 2675(b) in awarding damages in excess of the administrative claim.

The record shows that from a time not long after the original injury to the left spinal accessory nerve the peti-

tioner was advised by Navy physicians that even though the nerve may have been permanently and irreparably damaged that remedial surgery was available by Navy doctors that would lessen the drooping of the left shoulder and would decrease the pain caused by the drooping of the left shoulder. The petitioner was being so advised by a Navy doctor at the time she filed her administrative claim and arrangements were made to send her to Bethesda Naval Hospital for this surgery after she had filed her claim. The record shows that the petitioner continued to believe such relief was possible, and her testimony in this regard was wholly unchallenged by the respondent, until she was advised to the contrary at Bethesda Naval Hospital in February, 1972, several months after she had filed her claim. Based upon this record the District Court who had the opportunity to observe the witnesses, and in particular the petitioner, rejected the government's contention that the petitioner had failed to prove an intervening fact affecting the amount of her claim and reasoned that the knowledge and information concerning the absence of any remedial surgery which came to petitioner after she had filed her administrative claim was an intervening fact within the meaning of the statute.

Notwithstanding the substantial evidence in support of the District Court's Findings of Fact and the spirit and clear meaning of Rule 52(a) of the Federal Rules of Civil Procedure, upon appeal the Court of Appeals substituted its own findings to conclude that about the only extent of proof of an intervening fact in the case was that the claimant or her attorneys were of the opinion that the claim was of greater value than the amount of the original administrative claim.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court: The issue for interpretation in this case is what constitutes proof of intervening facts relating to the amount of the administrative claim under the Federal Tort Claims Act. The District Court found the petitioner had proved intervening facts while the appellate court said there was no such proof. There is nothing in the legislative history of the Act that provides a guide to its application and interpretation in this regard.

There are only two other decisions of Courts of Appeals which deal with the application of Title 28, U. S. C., § 2675(b). In *United States v. Alexander,* 238 F. 2d 314 (5th Cir. 1956), the Court affirmed the District Court's finding that the plaintiff met the requirements of § 2675(b). However, the Court in that case had difficulty because of the lack of legislative history in determining whether or not the injured party should prevail by reason of newly discovered evidence not reasonably discoverable at the time of filing the claim or because of intervening facts affecting the amount of the claim. The District Court in the instant case was troubled by the same question. The Fifth Circuit Court of Appeals continued, "It is clearly one or the other and, being so, the plaintiff is not limited in his recovery to the amount of his administrative claim." *Alexander,* 238 F. 2d 314 (5th Cir. 1956) at page 318.

The Court of Appeals for the Third Circuit in *Schwartz v. United States,* 446 F. 2d 1380 (3rd Cir. 1971) sustained a District Court's finding that the claimants had failed to sustain their burden of showing any newly discovered evidence or intervening facts. The opinion in that case does not give a detailed recitation of the evidence presented by the claimants, but on its face it

would appear that case presented the classic situation contemplated by Congress in prohibiting awards in excess of the administrative claim where there exists no evidence upon which to base a finding that there was newly discovered evidence not reasonably discoverable at the time of the claim or intervening facts affecting the amount of the claim.

The District Courts, when confronted with cases involving interpretations and applications of Title 28, U. S. C., § 2675(b), have reached results almost as divergent as there are reported opinions. Decisions in favor of allowing increased claims are: *Bonner v. United States,* 339 F. Supp. 640 (E. D. La. 1972); *Phillips v. United States,* 102 F. Supp. 943 (E. D. Tenn. 1952); *McCarter v. United States,* 373 F. Supp. 1152 (E. D. Tenn. 1973); *Joyce v. United States,* 329 F. Supp. 1242 (W. D. Penn. 1971); *Little v. United States,* 317 F. Supp. 8 (E. D. Pa. 1970); *Rabovsky v. United States,* 265 F. Supp. 587 (D. Conn. 1967). Decisions against allowing increased claims are: *Smith v. United States,* 239 F. Supp. 152 (D. Md. 1965); *Rudd v. United States,* 233 F. Supp. 730 (M. D. Ala. 1964); *Nichols v. United States,* 147 F. Supp. 6 (E. D. Va. 1957); *Corkle v. United States,* 94 F. Supp. 908 (E. D. S. C. 1951); *Menclewicz v. United States,* 116 F. Supp. 847 (W. D. N. Y. 1953); *Morgan v. United States,* 123 F. Supp. 794 (S. D. N. Y. 1954).

Because of the uncertainty which exists in the absence of an interpretation by this Court claimants and their attorneys are left without guidance as to the standards of proof which must be met in the event of newly discovered evidence not reasonably discoverable at the time the administrative claim is filed or what would constitute an intervening fact. In light of the opinion of the Court below in the instant case, claimants will be tempted to file administrative claims for amounts far in excess of that which

would seem reasonable at the time of the filing of the claim in order to protect themselves in the event of complications or developments that would render the original amount claimed grossly inadequate. This would hardly seem to be the original Congressional intent to encourage the settlement of claims administratively and reduce litigation under the Federal Tort Claims Act in the District Court. On the other hand, comfort might be taken from the Court of Appeals for the Sixth Circuit in the case of *Executive Jet Aviation, Inc. v. United States,* 507 F. 2d 508 (6th Cir. 1974), where in footnote 4 at page 516 the Court noted that it was not alone in holding that the clear demands of justice should preempt the technical procedures of the Tort Claims Act. The Court continued to note that there were many District Court opinions that had allowed claims that awarded damages in excess of the amount stated in the administrative claims even though those District Courts were straining the exception to avoid injustice that might result from literal applications of Title 28, U. S. C., § 2675(b).

The allowance of the petition in this case would afford both the opportunity for review of the question of whether the petitioner herein has been the subject of such an unjust result from a strictly literal application of the statute and would afford the Court an opportunity to review and resolve the problems inherent in cases of this nature on an important federal statute and would be conducive to the fair and uniform administration of justice.

2. **The decision below conflicts with the decision of another Court of Appeals as to the proper interpretation and application of Title 28, U. S. C., § 2675(b):** In the case of *United States v. Alexander,* 238 F 2d 314 (5th Cir. 1956) the Court of Appeals for the Fifth Circuit dealt with an interpretation of Title 28, U. S. C., § 2675(b). In

Alexander the claimant filed an administrative claim for a sum he initially thought adequate for the injuries to his shoulder. After the claim was denied suit was instituted for an amount in excess of the administrative claim. Plaintiff then amended his Complaint alleging that subsequent to the filing of the claim that he learned that the shoulder would require surgery. The District Court found that the amount claimed in the action in excess of the amount in the original claim was based upon the allegation and proof of intervening facts relating to the amount of the claim which were not reasonably to be anticipated at the time it was filed and that plaintiff was not limited to the amount of the claim presented. The government, on appeal, urged that it was error for the District Court to enter judgment in an amount exceeding that originally sought in the administrative claim. The Court of Appeals for the Fifth Circuit affirmed, citing *United States v. Yellow Cab Co.* 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951) and stated that the Act is to be liberally construed.

In the instant case petitioner had knowledge communicated to her by the treating Navy physicians that her condition could be alleviated by surgical procedures. She was given this knowledge before the claim was filed, and reaffirmed shortly after the claim was filed. However, the Navy specialists at Bethesda Naval Hospital to whom she was referred by the Navy physicians in South Carolina, ultimately advised petitioner that there existed no operation which would help her. The Court below has woven a fine distinction between what knowledge of a condition is in the *Alexander* case and petitioner's knowledge in this case. In *Alexander* the claimant thought he would not need surgery at the time the claim was filed, however, he later learned that his condition warranted surgery and the Court held that to be an intervening fact. Petitioner here was led to believe and thought there was surgery available to help

her. Here the District Court applying *Alexander*, found that the knowledge transmitted to petitioner that there were no operative procedures to alleviate her condition, which was contrary to what she had been led to believe for thirteen (13) months, was an important intervening fact affecting the amount of the claim. The only factual difference is that in the *Alexander* case the claimant found out that an operation would be required after the claim was filed and in this case the petitioner found out that an operation she had been told would improve her condition before and after her claim was filed was ultimately told that no such operation would benefit her. The petitioner's position here was that this was an intervening fact and the District Court so found. By rejecting the District Court's Finding, the Court of Appeals for the Fourth Circuit has placed itself in a conflicting position by holding that new knowledge could not constitute an intervening fact affecting the amount of the claim. Thus there appears a conflict between the United States Courts of Appeal for the Fourth and Fifth Circuits in interpreting and applying Title 28, U. S. C., § 2675(b) which should be resolved by this Court.

3. **The decision of the Court of Appeals herein is in conflict with the accepted and usual course of judicial proceedings and is in conflict with the Federal Rules of Civil Procedure resulting in substantial injustice:** The Court of Appeals has departed from the accepted and usual course of judicial proceedings by ignoring the substantial evidence upon which the District Court based its Findings of Fact and by considering matters not in evidence at trial thereby reducing the provisions of Rule 52(a) of the Federal Rules of Civil Procedure to a nullity. By holding that the District Court was clearly erroneous the Court of Appeals has given lip service to Rule 52(a) of the Federal

Rules of Civil Procedure but has failed to follow the spirit of the rule and the accepted and usual application of the rule.

Findings of the District Court are presumptively correct. *Crowe v. Cherokee Wonderland, Inc.*, 379 F. 2d 51 (4th Cir. 1967); *Coleman v. United States*, 176 F. 2d 469 (D. C. Cir. 1949); *Fleming v. Palmer*, 123 F. 2d 749 (1st Cir. 1941), *cert denied*, 316 U. S. 662, 62 S. Ct. 942, 86 L. Ed. 1739 (1942). It is not the function of a Court of Appeals to weigh the evidence *de novo*. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969); *United States v. E. I. Du Pont de Nemours & Co.*, 351 U. S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956); *Socash v. Addison Crane Co.*, 346 F. 2d 420 (1965); *Lichter v. Goss*, 232 F. 2d 715 (7th Cir. 1956). When reviewing non-jury cases, a Court of Appeals may find the decision of a District Court "clearly erroneous" if it is without substantial evidentiary support. *Baltimore and O. R. R. v. Postom*, 177 F. 2d 53 (D. C. Cir. 1949); *James Julian, Inc. v. President & Comm'rs of Town of Elton*, 341 F. 2d 205 (4th Cir. 1965); *Glasscock v. United States*, 323 F. 2d 589 (4th Cir. 1963). A Court of Appeals must take that view of the evidence and the inferences deducible therefrom which is most favorable to the party prevailing below. *Aunt Mid, Inc. v. Fjell-oranje Lines*, 458 F. 2d 712 (7th Cir. 1972), *cert denied*, 409 U. S. 877, 93 S. Ct. 130, 34 L. Ed 2d 131 (1972).

Here the Court below has departed from the accepted and usual course of judicial procedures in that it completely ignored the testimony of petitioner and the evidence of record thereby disregarding the function of the trier of facts to base its decision on its understanding of the testimony in the case, its observation and study of the documents submitted into evidence and to issue its Findings of Fact and Conclusions of Law. In this case the Court below

has ignored the true meaning of Rule 52(a) of the Federal Rules of Civil Procedure by viewing the evidence in a manner most favorable to respondent and in addition has considered matters not in evidence. Thereby the Court of Appeals substituted its own judgment to that of the District Judge and tried the case *de novo* on appeal.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a *Writ of Certiorari*, should reverse the judgment of the lower Court below and should affirm the Order of the District Judge that the petitioner have judgment against the United States of America in the amount of One Hundred Twenty-three Thousand Five Hundred Seventy-eight and 90/100 ($123,578.90) Dollars.

Respectfully submitted,

TERRELL L. GLENN,
JAMES H. MOSS,
Attorneys for petitioner.

APPENDIX

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APPENDIX A

Civil Action No. 72-893

TRANSCRIPT OF TRIAL

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT OF
SOUTH CAROLINA

CHARLESTON DIVISION

LIZZIE ETHEL KIELWIEN, PLAINTIFF,

versus

UNITED STATES OF AMERICA, DEFENDANT

[pp. 545-546]

The COURT: Mr. Hightower, I believe the statute provides in the alternative, that the claim is limited to the amount filed or the amount presented to the federal agency, —in this case $25,000.00, except where the increased amount sought in the suit or I assume sought in an additional claim would be relevant, is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts relating to the amount of the claim.

The Court finds as a fact that the plaintiff has alleged and proven intervening facts, or an intervening fact which does relate to the amount of the claim, namely, that after the date the claim was presented, the plaintiff learned, upon going to Bethesda, that no operation would give her any relief, and that this was a permanent lifetime disability.

I think that fact, being the most important factor,—while she did have information prior to going to Bethesda, that the end to end—

Mr. HIGHTOWER: Anastomosis.

The COURT: —anastomosis, or tying of the nerve together, would probably not be helpful and would not be

suggested. She really didn't know until she went to Bethesda that that surgery that was recommended, the muscle operation by the orthopedist, who explained the seriousness of it but who had not indicated that it wouldn't be helpful, and the plaintiff didn't learn until she sought someone higher—I am not sure that is the word she used, but at least someone in consultation with a greater skill than the local orthopedist,—she didn't learn until she went to Bethesda that that operation was completely out.

And I find that that is an important fact, and an intervening fact, that would warrant the presentation of a claim or the bringing of a suit for an amount in excess of the amount filed or the amount of the claim, because she thought, or she didn't know until sometime in January or February that there was no relief at all for her, and when she filed the claim, she had reason to think that there was relief for her. And I so find that that does amount to proof of the intervening fact or facts which does relate to the amount of the claim. And therefore she comes within the exception in the statute.

And I will overrule your motion.

• • •

[pp. 605-610]

The COURT: Gentlemen, as I said, I follow the practice of trying to dispose of nonjury matters when I hear them because I feel that I know more about them then than I will know at any other time.

I have tried to give this case appropriate, proper and due consideration.

I don't feel that requiring findings of fact and conclusions of law, briefs and other material from counsel would be of any further assistance. The briefs that have been submitted were fine briefs. The legal issues aren't complicated. I took what I think are copious notes on the testimony of the different persons, and other than some being furnished in a transcript, which would be at some distant time, I don't feel that any briefs from counsel or any additional proposed findings from counsel, as I said, I doubt would be of any additional assistance.

Therefore, in accordance with Rule 52 of the Federal Rules of Civil Procedure, the following contains the findings of fact and conclusions of law of this Court:

This Court finds as a fact that the plaintiff suffered a severance of the spinal accessory nerve on the left side as a result of surgery committed by Doctor G. D. Maxwell, an agent, servant and employee of the defendant, for whose acts the defendant is liable under the federal tort claims act, and that said agent, servant and employee of the defendant was at the time of the operation acting in furtherance of and in the scope of his employment by the defendant and under such circumstances for which the defendant, if it were a private employer, would be liable.

I find as a fact that the severance of the spinal accessory nerve was due to the negligence of the operating surgeon, Doctor Maxwell, and that said Doctor deviated from reasonable and acceptable medical practice in that he operated on the plaintiff to remove a lymph nodule, and in performing said operation he failed to give any consideration to either locating or avoiding the spinal accessory nerve while in the process of removing the lymph nodule.

I find as a fact that the reasonable medical standard under which Doctor Maxwell should have performed the operation requires that a direct effort be made to avoid the spinal accessory nerve when performing the removal of the lymph nodule, and that the failure by Doctor Maxwell to follow this reasonable medical standard was the direct and proximate cause of the severance of the plaintiff's spinal accessory nerve.

I find that as a result of the severance of the spinal accessory nerve the plaintiff has suffered a prominent and noticeable drooping of the left shoulder; she suffered the loss of the use of her left arm, lost strength in the left hand, and a paralyzed trapezius muscle, causing her shoulder to fall forward with resultant pressure on the nerves and blood vessels in the shoulder area, which fact causes the plaintiff to have constant pain in the left arm and shoulder.

I further find as a fact that these damages, suffered as a result of the severance of the spinal accessory nerve, have been endured by the plaintiff since the day of her operation on October 2, 1970, and these conditions are permanent, and there is no reasonable medical treatment available to the plaintiff which will to any appreciable extent remedy these permanent conditions.

I find as a fact that as a result of the physical condition of the plaintiff, above set forth, which is the direct and proximate result of the severance of the spinal accessory nerve, the plaintiff not only has suffered physical and mental pain but it has damaged her earning capacity and the ability to enjoy a normal life since the date of the operation approximately three and a half years ago, and these conditions are permanent. The plaintiff who is now 40 years of age has a life expectancy of 32 years, and she will continue to suffer these disabilities during the balance of her life.

Based on the foregoing findings of fact, I find and conclude as a matter of law that under the federal tort claims act, the defendant, as would a private employer, is responsible to the plaintiff for the negligence of its agent, servant and employee, Doctor G. D. Maxwell, as the result of an operation performed on the plaintiff by Doctor Maxwell, in which Doctor Maxwell's surgical technique was not within reasonable acceptable standards, and as a permanent result of this negligence and conduct on the part of Doctor Maxwell, the plaintiff has suffered permanent injuries resulting in disfigurement, damage to her earning capacity, inability to enjoy a normal life, and physical and mental pain, all of which conditions have existed since the date of the operation in October 1970, which conditions are permanent and will be with and endured by the plaintiff for the balance of her life expectancy of 32 years from the date of this trial.

I further find as a matter of law that the plaintiff is entitled to receive the following damages from the defendant, said damages being computed from the date of this trial:

(1) For permanent bodily disfigurement, $10,000.00.

(2) For damage to her earning capacity, computed at the rate of $10.00 per week, with an inflationary factor added of 25 percent, and discounted at the rate of 6 percent, a total of $9,154.60.

(3) For the inability to enjoy a normal life tenure with her usual and normal everyday routine, the sum of $20,000.00.

(4) For physical and mental pain and suffering, computed at the rate of $10.00 a day, or $3,650.00 per year, with a 25 percent inflationary factor added and discounted at the rate of 6 percent, $64,434.30.

I further find that for the period from October 1970 to date, that is, from the date of the plaintiff's operation to the date of the trial, for disfigurement, damage to her earning capacity, and the inability to lead and enjoy her normal life, physical and mental pain and suffering, the plaintiff is entitled to receive from the defendant the sum of $20,000.00.

Therefore, based on the foregoing, I find as a matter of fact and law, the Clerk shall enter judgment for the plaintiff against the defendant a total amount of $123,578.90.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 72-893

ORDER

For the reasons set forth in the oral Order of the court made at the completion of the trial of the above-entitled action, it is

ORDERED, that the plaintiff, Lizzie Ethel Kielwien, recover judgment against the defendant, United States of America, in the amount of $123,578.90.

SOL BLATT, JR.,
United States District Judge.

Charleston, South Carolina,
March 15, 1974.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1696

Appeal from the United States District Court for the District of South Carolina, at Charleston. Sol Blatt, Jr., District Judge.

Argued: November 11, 1975. Decided: April 22, 1976.

Before BOREMAN, Senior Circuit Judge, RUSSELL and FIELD, Circuit Judges.

• • •

RUSSELL, Circuit Judge:

The issue in this appeal is whether the District Court, having found that the United States was liable under the Federal Tort Claims Act,[1] was clearly erroneous in finding that there was an "intervening fact" permitting recovery

[1] 28 U. S. C. § 1346(b).

by the plaintiff in excess of the amount fixed by her in her administrative claim as filed with the Government under the requirements of 28 U. S. C. § 2675(a) and (b). We conclude that such finding was clearly erroneous and accordingly remand the cause to the District Court with direction that the judgment awarded be corrected by limiting the recovery to the amount stated in plaintiff's claim as filed under § 2675(a), 28 U. S. C.

The plaintiff is the wife of a Marine Sergeant. At the time involved here, she lived near the Parris Island Marine base at Beaufort, South Carolina. On October 1, 1970, she was admitted to the United States Naval Hospital at Beaufort for the removal of a lump on her neck. Immediately after the operation, she noticed that she "couldn't get [her] left arm up" and that her left shoulder "seemed to be drooping."[1a] When she returned home after the operation, this condition continued; in fact, the "drooping" of her shoulder was such that she "couldn't keep [her] bra strap up." She visited the hospital a number of times to complain of these difficulties and to seek relief. It was suggested to her at first by the examining physician that her condition represented normal post-operative symptoms, which, with time, should disappear. Because of the continuance of her problems, however, she was given further examinations in January, 1971, and was advised to take physical therapy. After about four or five treatments, the physical therapist sent her back to the surgeon who had operated on her and she was examined and advised that she had "either a nerve problem or a muscle problem." She was then referred to a neurologist, Dr. Feller, at the Charleston Naval Hospital for further examination.

On February 24, 1971, she was seen by Dr. Feller, who, at the completion of his examination, told her that her left spinal accessory nerve had been either severed or injured, presumably in the operation, and recommended exploratory surgery. She reported back to the surgeon in Beaufort who then referred her to Dr. Baird, a neurosurgeon at the

[1a] In answer to an interrogatory filed in this proceeding, the plaintiff stated that "[a]ll of these problems [disabilities] manifested themselves immediately after the operation" and were "permanent."

Charleston Naval Hospital. After examination on March 30, 1971, Dr. Baird told her that he would not advise surgery, that she was "partially paralyzed," that such condition was permanent and that any attempt to repair the nerve would only mean she "could possibly come out more paralyzed." The same problems continued and she was referred to Dr. Herring, an orthopedist, who, on August 30, discussed with her the practical possibilities of an operation to reconstruct the back muscles, in the hope of "help[ing] with the movement of [her] arm and some of the pain." Dr. Herring brought a Dr. Barone, a private neurosurgeon, into consultation. Dr. Barone examined the plaintiff on September 7, 1971. After this examination, the plaintiff was told again by Dr. Barone what Dr. Baird had previously told her, that "surgery on the nerve" was out of the question and when she saw Dr. Herring later, he told her that so far as any effort to improve her condition, through an operation to construct her back muscles, that operation would represent "major surgery," which he as an orthopedic surgeon had never attempted, and that there "was no guarantee at all that it would even be successful." The plaintiff testified that Dr. Barone told her at this time that she was "going to have to live with the pain."[2] After receiving this advice, the plaintiff expressed no desire to have the muscle operation.

About this time the plaintiff engaged counsel to prosecute a claim against the defendant. Prior to this, all physicians, who had treated the plaintiff or had been consulted by her, had been either in the naval service or engaged by the Government to examine and treat the plaintiff. Her counsel, however, determined to have her examined by a private neurosurgeon in Charleston, Dr. Luther Martin. The plaintiff saw Dr. Martin on September 10, 1971. She gave him the same symptoms that she had previously given the other physicians. After examining her, Dr. Martin told her that her injuries were permanent but indicated that two operative procedures might be attempted. Neither, however, in his opinion would give relief.[3] The first would

[2] Transcript, p. 262.
[3] *See* page 23, Transcript.

be an operation whereby the suturing of the severed nerve would be accomplished, an operation that he would not favor[4] and the other was the possible restructuring of the back muscles. Dr. Martin, however, said that he was "very skeptical about" this second operation, that he didn't think it "a very practical procedure" and that, in his opinion, there was "unlikelihood of success" in such an operation. Dr. Martin provided a written opinion to this effect to the plaintiff's counsel on September 23, 1971. In this letter, he repeated that he did not "know of any treatment which would benefit the patient other than the possible exploration of the left side of the neck with an attempt to suture the nerves" or the "possibility [of] * * * some type of reconstructive surgery to the left shoulder muscle." He expressed, however, "doubt that either of these procedures would be of very much benefit to the patient."[5]

On the basis of Dr. Martin's report and the advice received by her from the other doctors who had seen her, the plaintiff filed her administrative claim with the Department of Navy, under date of October 1, 1971, for personal injury, fixing the amount of her claim as $25,000.00. In this claim she described her injury as arising out of an operation, in the course of which her "spinal accessory nerve was severed leaving drooping left shoulder and permanent disability to the left arm."[6] When no action was taken on her claim, plaintiff filed this action on August 24, 1972. In

[4] Dr. Martin testified that he had no knowledge of any successful operation of this kind ever being performed. Pages 109-10, Transcript. There was some evidence that such operation, to have any promise whatsoever of success, must follow closely after the severing of the nerve itself. The reason for this opinion is the increased atrophy that follows with the passage of time.
[5] In a subsequent letter dated March 14, 1973, he was quite specific that he knew of no "specific treatment which would be of benefit to the patient" and that plaintiff's injuries represented "a condition that the patient will have to learn to live with and will cause her considerable disability and pain for the remainder of her life."
[6] At one point, the plaintiff argued that the administrative claim was not properly in the record, never having been offered in evidence by the defendant. The obligation to prove the claim rested not on the defendant but on the plaintiff. It was an essential part of her case. Its presence in the case is jurisdictional. For the plaintiff to deny proof of such claim would be to undercut her right to sue at all. However, both the parties have acted upon the presence in the record of the claim and both are precluded from denying the inclusion in the record of the claim.

her complaint the plaintiff alleged that her injuries resulted from the negligence of the physicians who operated on the plaintiff and who owed the duty to treat her after the operation. She made no reference to the administrative claim she had filed other than an averment that she had exhausted administrative remedies under § 2675, 28 U. S. C.

After a trial, the District Court found as a fact (1) that the plaintiff's injuries were caused by the negligence of the Government's agents;[7] (2) that the plaintiff was not limited in her right to the maximum amount stated in her claim because of "intervening facts relating to the amount of the claim" and the extent and permanency of her injuries;[7a] and (3) that the plaintiff was entitled to judgment in the sum of $123,578.90. The District Court did find that the extent and permanency of plaintiff's injuries were not based "upon newly discovered evidence not reasonably discoverable at the time of presenting the claim" to the Government.

The Government has appealed. It does not challenge the finding of negligence; its appeal raises the single issue whether the District Court committed clear error in finding that the plaintiff both alleged and proved "intervening facts" justifying under § 2675(b), 28 U. S. C., a recovery by the plaintiff in excess of the maximum amount set forth in the claim she filed with the Government.

The right to sue the Government exists wholly by consent as expressed in § 2675, 28 U. S. C., which fixes the terms and conditions on which suit may be instituted. The first requirement is the filing of a claim. That requirement is jurisdictional and is not waivable. *Provancial v. United States* (8th Cir. 1972), 454 F. 2d 72, 74; *Driggers v. United States* (D. S. C. 1970), 309 F. Supp. 1377, 1379-80; *Hlavac v. United States* (D. Ill. 1972), 356 F. Supp. 1274, 1276; *Robinson v. United States Navy* (E. D. Pa. 1972),

[7] It is not to be assumed from this that the issue of liability was conceded. Liability was hotly disputed during the trial; considerable testimony was introduced on the issue; and the liability of the United States could have been decided either way. The District Court, however, found for the plaintiff and that finding cannot be faulted as clearly erroneous. It was no doubt recognition of this fact that led the Government not to appeal the issue of negligence.

[7a] *See* § 2675(b), 28 U. S. C.

342 F. Supp. 381, 382-3; *Goodman v. United States* (M. D. Fla. 1971), 324 F. Supp. 167, 170, aff'd, 455 2d 607. The statute further provides that no action shall be instituted "for any sum in excess of the amount of the claim presented to the federal agency." The statute, however, includes an escape clause with reference to this *ad damnum* limitation. It adds that a plaintiff may sue for a sum greater than that stated in his or her claim if "the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." The burden of establishing such "newly discovered evidence" or "intervening fact," it has been held, rests on the claimant-plaintiff. *Smith v. United States* (D. Md. 1965), 239 F. Supp. 152, 154. The District Court found, and there is no appeal from such finding, that the plaintiff, though failing to sustain the burden of establishing that the "increased amount" claimed by the plaintiff was "not reasonably discoverable at the time" she presented her claim, had sustained her burden in establishing "intervening facts relating to the amount of the claim," entitling her to judgment in excess of the amount stated in her claim. It is this latter finding which is challenged. We are of the opinion that the District Court's finding that the plaintiff had proved "intervening facts" which would justify judgment in excess of the amount of her claim was clearly erroneous.

It is the plaintiff's contention that she did not know the full extent of her injuries or their permanent nature until she visited Bethesda Naval Hospital in December, 1971 and February, 1972, and was told by Dr. Brown, an orthopedist, in the presence of his superior, Dr. Wilson, that neither "neck surgery" nor "muscle surgery," in his opinion, would "help" her. It was this advice, received some four months after she had filed her claim, which constitutes the "intervening fact" which plaintiff asserts, and the District Court found, justifies her right under the statute to recover more than the amount stated in her claim. Dr. Brown's diagnosis of the plaintiff's condition was, though, the same as the plaintiff had been repeatedly given by

other physicians from February, 1971, on. As we have seen, she was told by Drs. Feller, Baird, Herring, Barone and Martin—all before she filed her claim—that she had a permanent disability, that she was paralyzed and that there was no form of surgery that, in the words of Dr. Martin, offered "a very practical procedure" in an attempt to relieve even partially her disability. Dr. Wilson's and Dr. Brown's opinions were merely confirmation of what plaintiff had already been told, not once but repeatedly by other physicians and surgeons, including one privately employed, before she filed her claim. Their diagnoses and advice were thus cumulative and confirmatory of what plaintiff had largely already been told. Their diagnoses could not be considered an "intervening fact" within the meaning of § 2675(b).

This case is quite different factually from those cited and relied on by the plaintiff. In *United States v. Alexander* (5th Cir. 1956), 238 F. 2d 314, the plaintiff, unlike the claimant here who filed her claim almost a year after her injury, filed his claim some six weeks after his shoulder injury. During the time the agency was considering his claim, the claimant in that case on several occasions advised the agency that his injury was more serious than originally contemplated. He later was told for the first time that his shoulder would only mend after surgery. The District Court found this to be either "newly discovered evidence" of the extent of his injury or an "intervening fact, relating to the amount of his claim," and this finding was sustained on appeal. The claimant's case here is, however, the opposite of that of the claimant in *Alexander*. She knew some eight months before she filed her claim the extent and permanency of her disability and the "unlikelihood of any relief." In *Rabovsky v. United States* (D. Conn. 1967), 265 F. Supp. 587, the plaintiff "through no fault of his own" was unable to secure from his doctor a statement of his condition before he filed his claim and he so advised the agency when he filed his claim. The fact that it was only later that by due diligence he was able to secure an opinion on "[t]he medical extent of his injuries and expenses" was sufficient to bring him within the exception

of § 2675(b). In this case, though, the plaintiff had repeated medical advice on the extent of her injuries prior to the filing of her claim. *Joyce v. United States* (W. D. Pa. 1971), 329 F. Supp. 1242, *vacated on other grounds,* 474 F. 2d 215, is similar to *Rabovsky*. There, "[t]he initial claim was made to the administrative agency within days of the injury, at a time when the full benefits of medical diagnosis were not available" and when "the full extent of his injuries • • • are such that medical science [could not] immediately establish them."[8] In *Bonner v. United States* (E. D. La. 1972), 339 F. Supp. 640, it was found that the plaintiff did not know the diagnosis of her condition when she filed her claim because "neither plaintiffs nor their counsel could reasonably have known the medical extent of Hazel Bonner's disability at the time of the administrative claim."[9] That is not this case.

We find no difference between this case and innumerable others where the claimant has been limited in his or her recovery by the amount fixed in his or her administrative claim. *See Schwartz v. United States* (3d Cir. 1971), 446 F. 2d 1380; *Smith v. United States, supra; Nichols v. United States* (E. D. Va. 1957), 147 F. Supp. 6; *Corkle v. United States* (D. S. C. 1951), 94 F. Supp. 908; *Menclewicz v. United States* (W. D. N. Y. 1953), 116 F. Supp. 847; *Morgan v. United States* (S. D. N. Y. 1954), 123 F. Supp. 794. The Federal Tort Claims Act is remedial and should be liberally construed to grant the relief contemplated by Congress; but, as the Court said in *Nichols v. United States, supra,* at p. 10, "[t]he statute, 28 U. S. C. § 2675(b), would be meaningless if claimants, after rejection of their claim, could institute actions for amounts in excess of the claim filed merely because they, or their attorneys, are of the opinion that the claim has a greater value" and that is about the extent of the proof of an "intervening fact, relating to the amount of the claim" in this case.

The cause is remanded to the District Court with instructions to reduce the amount of plaintiff's recovery, as

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[8] 329 F. Supp. at 1247-8, *supra.*
[9] 339 F. Supp. at 651.

allowed by the judgment entered, to the maximum amount claimed in her administrative claim.

(Reversed and remanded with directions.)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1696

ORDER DENYING REHEARING

Upon consideration of the petition for rehearing and of the petition for rehearing *en banc;*

Now, therefore, with the concurrence and approval of the other members of the panel and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35(b),

It is ADJUDGED and ORDERED, That the petition for rehearing is denied.

/s/ DONALD RUSSELL,
United States Circuit Judge.

Filed June 23, 1976.
U. S. Court of Appeals,
Fourth Circuit.